Supreme Court, U.S.
FILED
OCT 15 1998
OFFICE OF THE CLERK

No. 98-464

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

TOWN OF TRENTON,

Petitioner,

vs.

LOUNGE MANAGEMENT, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court, or any other federal court, has the constitutional authority to construe a state statute or municipal ordinance in contravention to the construction given it by the highest state court of competent jurisdiction.

2. Whether the town ordinance involved in this case, as authoritatively construed the Supreme Court of Wisconsin, is unconstitutionally overbroad.

3. Whether the Supreme Court of Wisconsin correctly ruled that, as a result of the decision of this Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the ordinance cannot be sustained pursuant to the Twenty-First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

The petition correctly identifies the parties to the proceeding below.

TABLE OF CONTENTS

Questions presented I

Parties to the proceedings below ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for denying the writ 7

I. This court lacks constitutional authority to give a construction to the ordinance in question which differs from that given by the majority of the Wisconsin Supreme Court 7

II. The Wisconsin Supreme Court's holding that the ordinance on its face is facially overbroad is consistent with the decisions of this Court and should not be disturbed 10

III. The Wisconsin Supreme Court correctly interpreted this court's decision in *44 Liquormart* 11

Conclusion 14

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

First Amendment to the U.S. Constitution 5, 6, 10

Fourteenth Amendment to the U.S. Constitution 5

Twenty-First Amendment to the U.S, Constitution 4, 7, 12, 13

STATUTES:

Wisconsin Stat. Sec. 123.12 2

Wisconsin Stat. Sec. 125.10 1

ORDINANCES:

Town of Trenton Ordinance No. 10 . . . . . 1, 3, 5, 11

CASES:

Barnes v. Glen Theatre, Inc., 510 U.S. 561 (1991) . 12, 14

California v. LaRue, 409 U.S. 109 (1972) 13

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) *11*

Erznozik v. City of Jacksonville, 422 U.S. 205 (1975) . . 12

Fond Du Lac County v. Mentzel,
195 Wis. 2d 313 (Wis. App. 1995) 3, 14

Freedman v. Maryland,
380 U.S. 51 (1965) 9

Gooding v. Wilson, 405 U.S. 518, (1972) 9

Gurley v. Rhoden, 421 U.S. 200 (1975) 9

44 Liquormart, Inc v. Rhode Island,
517 U.S. 484 (1996) 7, 10, 12, 13, 14

Landmark Communications, Inc. v.
Virginia, 435 U.S. 829, (1978) 10

Marks v. United States, 430 U.S.
188, (1977) 14

New York v. Ferber, 458 U.S. 747,
769, n. 24 (1982) 10

O'Brien v. Skinner, 414 U.S. 524, (1974) 10

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 10

Schad v. Borough of Mount Ephriam,
452 U.S. 61 (1981) 10

Schultz v. City of Cumberland,
195 Wis. 2d 554 (Wis. App. 1995) 3, 7, 10, 12

Terminiello v. Chicago, 337 U.S. 1 (1949) 10

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1971) 9

Triplett Grille, Inc. v. City of Akron,
40 F. 3d 129, (6th Cir. 1994). 14

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971) 9

Young v. American Mini-Theaters, Inc.,
427 U.S. 50 (1976) 13

STATEMENT OF THE CASE

Respondent Lounge Management, Ltd., operates a nightclub in the Town of Trenton in Pierce County, Wisconsin. Respondent sought to showcase non-obscene nude and semi-nude performers in the club. It brought suit seeking injunctive and declaratory relief that the Town's ordinance barring such entertainment in establishments licensed for liquor sales was unconstitutional under both state and federal Law.

Defendant Town of Trenton's Ordinance No. 10 provides:

> AUTHORITY: This ordinance is enacted pursuant to powers granted by virtue of present Wisconsin Statutes, including Sec. 125.10.
>
> RESTRICTIONS: There shall be no public nudity at a public licensed establishment.
>
> DEFINITION: Nudity means the showing or exposing of the human or male or female genitals, pubic area or buttocks wit less than a full opaque covering, or of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.
>
> Public means any place of accommodation or amusement, which shall be interpreted broadly to include, but not be limited to places of business or recreation, hotels, motels, resorts, restaurants, or for a consideration.

Campgrounds are also included.

Exceptions.

A. This ordinance is not to be interpreted as restricting the proper use of a bathroom facility by a male or female in an enclosed area where the person is of the same sex designated for such room, and is not engaging in any sexual or exhibitionist purpose to or in front of or adjacent to other persons.

B. This ordinance is not to be interpreted to prevent activities in rooms privately rented in a hotel, motel, resort, or camper if at a campground, if the person(s) involved rented such private facility or own it and has not invited or allowed members of the public, who are not immediate family members, to be at such location.

VIOLATION: Each violation of this ordinance shall result in a forfeiture of not less than $500.00 or more than $1,000.00. When using a citation form of enforcement, the deposit allowed shall be $500.00 for the first offense, or $1,000.00 for a second or greater offense within five years. Pursuant to procedures set forth in Wisconsin Statute 123.12, or town ordinance, violation constitutes sufficient grounds for board consideration of license suspension, revocation, or non-renewal where such violation occurred in conjunction with or related to the activity

licensed for.[1]

On May 14, 1996, the Pierce County Circuit Court, the Honorable Robert Wing, presiding, entered findings, order, and judgment, a copy of which is set forth as Appendix C to the petition for writ of certiorari upholding the constitutionality of Trenton Town Ordinance No. 10 and denying the request for injunctive relief.

On appeal, the Wisconsin Court of Appeals, in an unreported decision set forth as Appendix B to the Petition for Writ of Certiorari, requested the Wisconsin Supreme Court to resolve the issue of the constitutionality of Trenton Town Ordinance No. 10. In so doing, the Court of Appeals noted, that within two weeks of each other, the court had reached obviously contradictory results with respect to two similar ordinances, in *Fond du Lac County v. Mentzel,* 195 Wis. 2d 313 (Wis. App. 1995), in which the court invalidated, under the First Amendment to the United States Constitution, a ban on nude dancing in licensed establishments, and *Schultz v. City of Cumberland,* 195 Wis. 2d 554 (Wis. App. 1995), in which the court upheld a local ordinance banning nude entertainment in

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1 A full copy of the text of the ordinance is set forth in Appendix D to the Petition for Writ of Certiorari.

licensed establishments, premising its decision almost entirely on the state's authority to regulate liquor under the Twenty First Amendment to the United States Constitution.

In discussing the impact of the two decision, the Court of Appeals wrote:

> "There are several concerns that arise when considering these two published decisions of this Court. First, *Schultz* decided that the dispositive factor was the application of the Twenty-First Amendment to establishments licensed to sell liquor. In so doing, we invoked several decision of United States Supreme Court and others broadly interpreting the Twenty-First Amendment's grant of state police powers to regulate traffic in intoxicating liquors. Lounge Management now contends that the more recent decision of the highest court, most notably *44 Liquormart, Inc v. Rhode Island*, 116 S. Ct. 1495 (1996), effectively overturns the holding of *Schultz*. *44 Liquormart, Inc* rejected Rhode Island's reliance on the Twenty-First Amendment to enact laws abridging commercial speech in advertising of liquor. [Citation omitted.] In so doing, the Supreme Court overruled language in several previous cases suggesting that the Twenty-First Amendment increase a state's power to restrict First Amendment rights. Second, apart from the question of the viability of *Schultz* in light of *44 Liquormart*, *Schultz* gives a broader reading of the holding in *Barnes* that is consistent with

Mentzel.

> Finally, comments by counsel at oral argument in *Schultz*, as well as reports of prosecution in state news reports, suggests that local ordinances banning pubic nudity are wide-spread in Wisconsin. In light of *Cook v. Cook*, [560 NW 2d 246 (Wis. 1997)], declaring an absence of power in this court to overrule, modify or withdraw language from previously published decision, we certify this matter for further consideration (footnote omitted)."

The Wisconsin Supreme Court, accepted certification and in a decision set forth as Appendix A to the Petition for Writ of Certiorari and reported at 580 NW 2d 156 (Wis. June 18, 1998), reversed the decision of the Circuit Court and held Trenton Town Ordinance No. 10 to be facially overbroad, in violation of the First and Fourteenth Amendments to the United States Constitution. In so doing, the Supreme Court of Wisconsin made three important points:

First of all, the court noted that facially, as written, the ordinance was impermissibly overbroad, since it prohibited substantial activity entitled to the protections of the First Amendment. In so doing, the majority opinion of the Wisconsin Supreme Court noted:

"As the language of the Ordinance indicates,

and as defense counsel was forced to concede at oral argument, several hypothetical situations exist in which the Ordinance would impinge on protected expression involving public nudity. Such examples include public exhibition of art work or artifacts depicting nudity, public display of a television program including brief nudity, and any forms of expressive live nudity that occurs within a 'public licensed establishment' such establishments include private hotel rooms, campgrounds, taverns, theaters, or any other place of business, recreation, accommodation or amusement.

Such overbreadth is largely the result of the generalized terminology used by the Town when drafting the Ordinance and its specific command that portion so the ordinance be 'interpreted broadly.' The ordinance does not prohibit nude dancing-it prohibits all public nudity. The Ordinance does not limit its application to establishments licensed to sell alcohol-it applies to all publicly licensed establishments (footnote omitted). The Ordinance does not limited itself to live nudity-it apparently applies to all forms of nude depiction (footnote omitted). Accordingly, the Ordinance regulates expressive conduct protected by the First Amendment to the United States Constitution that has no connection to the potential harmful secondary effects arising from nude dancing in liquor establishments and does so in a real and substantial manner." Petitioner's Appendix at 1.11-1.12, 219 Wis. 2d at 580 NW 2d at 161-

162.[2]

Secondly, the majority of the Supreme Court of Wisconsin considered and rejected the argument that the statute could be narrowly construed in order to preserve its constitutionality. After an extensive discussion about an alternative construction of the statute which might preserve its constitutionality, the Wisconsin Supreme Court majority wrote:

> "As the discussion above indicates, the proffered constructions of the ordinance are inconsistent with the broadly drafted terms and purpose of the Ordinance. Such construction raised the specter of 'judicial legislation' [Citation omitted]. We decline the invitation to engage in such legislation and leave the task of writing a constitutionally permissible Ordinance to that branch of government where such power properly lies-the Town Board." Petitioner's Appendix at 1.15, 580 NW 2d 163.

Third, the Wisconsin Supreme Court noted that to the extent that the earlier Court of Appeals opinion in *Schultz v. City of Cumberland*, supra, 195 Wis. 2d 554 (Wis. App. 1995), was premised on the Twenty-First Amendment to the United States Constitution, that decision has been effectively overruled

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2 Even the dissenting opinion conceded that ordinance was "at first glance overbroad." Petitioner's Appendix at 1.19, 580 NW 2d at 164.

by this Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 584 (1996). See n. 8 of the Wisconsin Supreme Court's opinion, set forth in Petitioner's Appendix at 1.39, 219 Wis. 2d at 580 NW 2d at 161 n. 8.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS CONSTITUTIONAL AUTHORITY TO GIVE A CONSTRUCTION TO THE ORDINANCE IN QUESTION WHICH DIFFERS FROM THAT GIVEN BY THE MAJORITY OF THE WISCONSIN SUPREME COURT.

At the outset, it should be noted that neither Respondent nor the dissenting justices below make the argument that the ordinance at issue, on its face, or as construed by the majority of the Wisconsin Supreme Court is not unconstitutionally overbroad. Quite to the contrary, the first question posed by Petitioner in its petition for writ of certiorari is the following:

> "Whether the Supreme Court of Wisconsin erred in finding the Town of Trenton's anti-nudity ordinance to be overbroad, in violation of the First Amendment to the United States Constitution, while refusing to apply an available and limiting construction of the ordinance that would have cured any substantial overbreadth (emphasis supplied)."[3]

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2 See Petition for Writ of Certiorari at p.i.

This Court has repeatedly made it clear that if the Supreme Court of Wisconsin did not supply a limiting construction to save the constitutionality of the ordinance at issue here, this Court lacks the authority to do so.

For example, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), this Court authoritatively construed a federal customs statute authorizing the seizure of alleged obscene materials to provide the procedural due process mandated by earlier decisions of this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), and *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1971), notwithstanding the fact that this Court had failed to provide such authoritative construction in either the *Freedman* or *Teitel* cases. This Court explained that earlier failure as follows:

> "The obstacle in *Freedman* and *Teitel* was that the statutes were enacted pursuant to state rather than federal authority; while *Freedman* recognized that a statute failing to specify time limits could be saved by judicial construction, it held that such construction had to be 'authoritative' [citation omitted], and we lack jurisdiction authoritatively to construe state legislation." Id. at 369.

The principle that this Court, as well as other federal courts, lack the power authoritatively to construe state statutes

and local ordinances to preserve their constitutionality has been repeated on numerous occasions by this Court. See, for example, *Gooding v. Wilson,* 405 U.S. 518, 520-521 (1972), and *Gurley v. Rhoden,* 421 U.S. 200, 208 (1975).

Moreover, not only has this Court stated that it lacks the power authoritatively to construe state statutes or municipal ordinances, this Court had repeatedly stated that it is absolutely bound by any authoritative construction given to a state statute or local ordinance by the state's highest court. For example, in *O'Brien v. Skinner,* 414 U.S. 521, 524 (1974) this court stated:

> "The construction given the New York statutes by its trial court and the Appellate Division may well have been a reasonable interpretation of New York law, but the highest court of the state has concluded otherwise and it is not our function to construe a state statute contrary to the construction given it by the highest court of the state."

Likewise, in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), a situation identical to the instant case, in that it involved a facial overbeadth challenge of the First Amendment to a city ordinance, this Court stated, "In construing the St. Paul ordinance, we are bound by the construction given to it by the

Minnesota court." Id. at 381.[4]

Consequently, to the extent that Petitioner seeks to salvage the overbreadth of Trenton Ordinance No. 10 by asking this Court to apply a narrowing construction Wisconsin Supreme Court has rejected Petitioners ask this Court to act beyond its legal authority and contrary to decades of established case law.

II. THE WISCONSIN SUPREME COURT'S HOLDING THAT THE ORDINANCE ON ITS FACE IS FACIALLY OVERBROAD IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND SHOULD NOT BE DISTURBED.

Because this Court lacks the authority to give the Trenton Town Ordinance narrower construction than that given it by the Wisconsin Supreme Court, the case presented by the Petition is not the constitutional validity of an ordinance prohibiting the regulation of live, barroom nude dancing in licensed alcohol establishments; rather the question is the constitutionality of the ordinance which prohibits any display of

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3 Other cases in which this Court has reached the same conclusions include *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

nudity whatsoever, live or pictorial; of any length and of any artistic value, not only in a licensed liquor establishment, but virtually in any place of public accommodation, including hotels, motels, and campgrounds. To say that this type of ordinance is unconstitutionally overbroad is absolutely consistent with decades of decisions of this Court. See, e.g. *Doran v. Salem Inn, Inc.*, *422 U.S. 922 (1975); Erznozik v. City of Jacksonville*, 422 U.S. 205 (1975); and *Schad v. Bourough of Mount Ephriam*, supra, 452 U.S. 61 (1981)[5]

III. THE WISCONSIN SUPREME COURT CORRECTLY INTERPRETED THIS COURT'S DECISION IN 44 LIQUORMART.

Petitioner's primary challenge appears to be that the Wisconsin Supreme Court's decision in the instant case is contrary to the decision of this Court in *44 Liquormart, Inc v. Rhode Island*, supra, 517 U.S. 484 (1996). The argument is without merit.

As already noted, supra, the Wisconsin Supreme Court mentioned *44 Liquormart* only to hold the earlier decision of

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4 A different result is not compelled by *Barnes v. Glen Theatre, Inc.*, 510 U.S. 561 (1991). In that case, a facial overbreadth challenge was expressly not considered, in that the Indiana Supreme Court had previously given a limiting construction to the ordinance to save it from such a challenge. See, Id. at 564, n. 1. Indeed, *Barnes* further demonstrates this Court's obligation to defer to the authoritative construction of state statutes and local ordinances provided by state courts.

the Wisconsin Court of Appeals in *Schultz v. City of Cumberland*, supra, 195 Wis. 2d 554 (Wis. App. 1995), to be inapplicable, since *Schultz* was based virtually exclusively on the Twenty-First Amendment authority to regulate liquor. See 219 Wis. 2d at 580 NW 2d at 161, n. 8.

In so doing, the Wisconsin Supreme Court was absolutely consistent with this Court's holding in *44 Liquormart*. The plurality opinion of Justice Stevens clearly states that, notwithstanding this Court's earlier decision in *California v. LaRue*, 409 U.S. 109 (1972), and its progeny, "the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." Id. at 516. Likewise, Justice O'Connor's concurring opinion states, "Nothing in the [Twenty-First] Amendment's text or history justifies its use to alter the application of the First Amendment." Id. at 532, O'Connor J. concurring.

To be sure, Justice Steven's plurality opinion expressly stated that this Court in *44 Liquormart* did not intend to overrule the result in *LaRue*. However, in so doing, Justice Stevens especially made note of the state's authority to "restrict the kind of 'bacchanalian revelries' described in *LaRue*, regardless of alcoholic beverages are involved." Id. at 515.

Plainly, as already noted, supra, the breadth of the ordinance at issue here goes far beyond that necessary to restrict "bacchanalian revelries."

Moreover, Justice Stevens, in the plurality opinion, expressly relied upon two cases, *Barnes*, supra, and *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976), both of which involved regulation of sexually oriented business, based upon the "secondary effects" caused.[6]

Consequently, the only reasonable reading of the plurality and concurring opinions in *44 Liquormart* is that regulation of nude entertainment in liquor establishments must now be judged by the same constitutional tests as nude dance entertainment in non-liquor establishments, to-wit: the extent to which the regulation at issue is narrowly tailored to deal with the adverse secondary effects caused by such sexually explicit entertainment, of whether liquor is present or not.

As already noted, supra, Petitioner makes no argument

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5 Barnes was a divided opinion, with the plurality opinion of Chief Justice Rehnquist upholding the statute based upon the state's interest in order and morality, and Justice Souter in his occurrence upholding the ordinance based upon the state's interest in combatting adverse secondary effects. Using the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), the Wisconsin Supreme Court interpreted Justice Souter's concurrence to be the holding in *Barnes*. See 580 NW 2d at 160. In doing so, the Wisconsin Supreme Court was consistent with most other courts that have addressed the issue. See, for example, *County of Fond Du Lac v. Mentzel*, supra, 195 Wis. 2d 313, 326 (Wis. App. 1995), and *Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129, 134 (6th Cir. 1994).

that the ordinance, as construed by a majority of the Wisconsin Supreme Court is so narrowly tailored.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be, in all respects, denied.

Dated:

Respectfully submitted,

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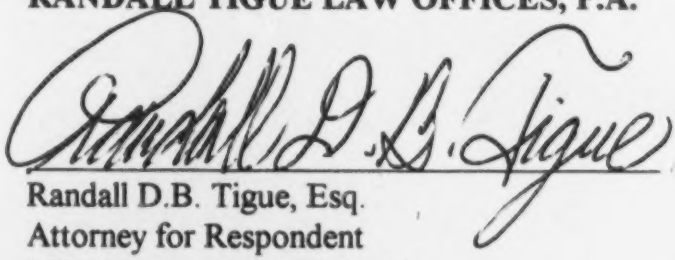

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